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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 73-242

THOMAS L. THAGGARD, SR., et al.,
Petitioner

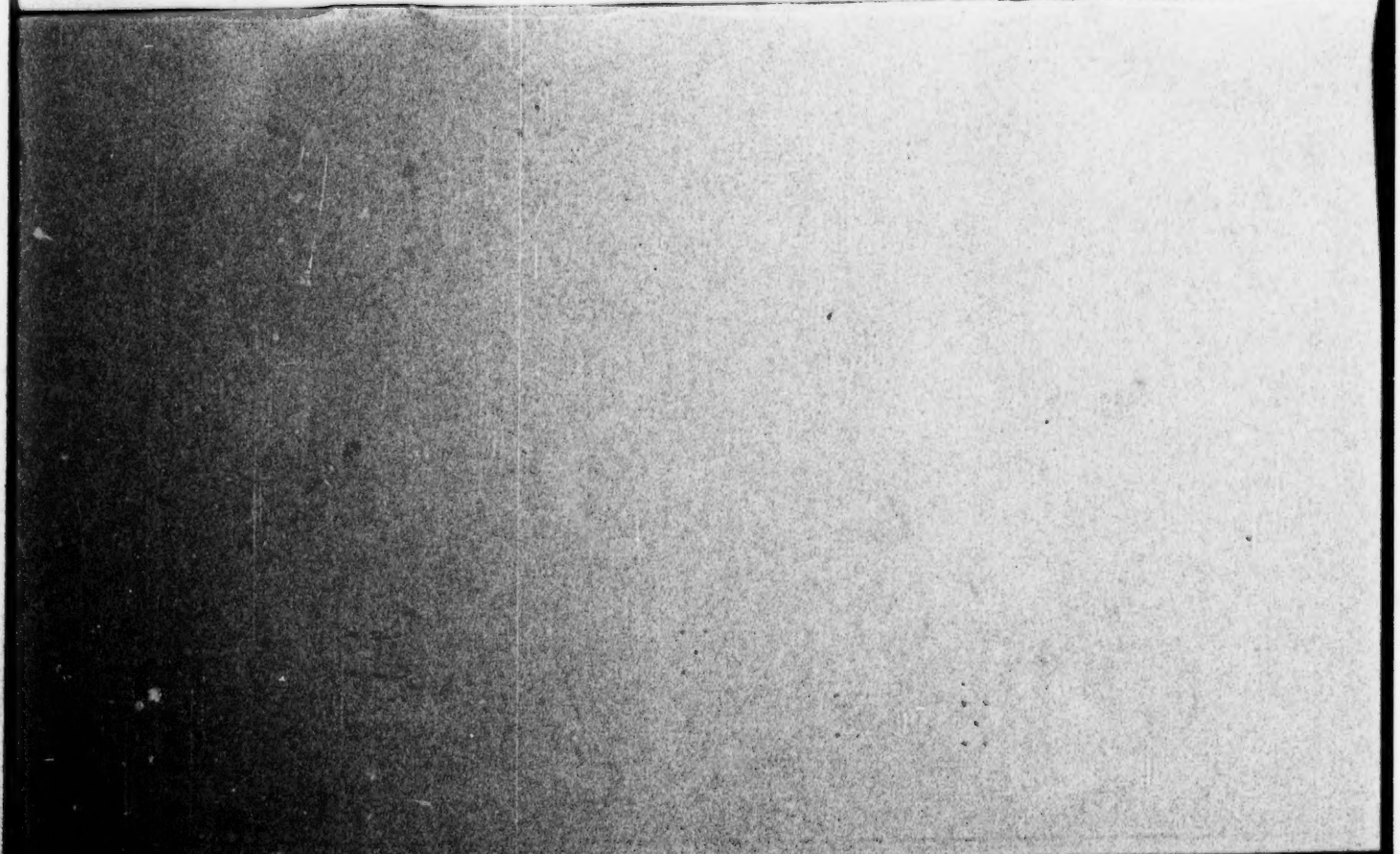
versus

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

J. PAUL LOWERY
Suite 1100 - Bell Building
Post Office Box 411
Montgomery, Alabama 36101
Counsel for Petitioner

August, 1973



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NO.

THOMAS L. THAGGARD, SR., et al.,
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PETITION FOR WRIT OF CERTIORARI
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FOR THE FIFTH COURT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, THOMAS L. THAGGARD, SR., respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit rendered on the 16th day of April, 1973 which affirmed the conviction of Petitioner rendered by the United States District Court for the Middle District of Alabama.

Application for rehearing was made to the Fifth Circuit Court of Appeals and was denied on June 8, 1973.

Motion to extend the time for filing of petition for Writ of Certiorari to this Court was made and order was made by this Court extending the time for filing to and including August 7, 1973.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit appears in Appendix A.

The opinion denying petition for rehearing appears in Appendix B.

JURISDICTION

This Court has jurisdiction and authority to review the decision of the United States Court of Appeals for the Fifth Circuit by authority of Rule 19(b), Revised Rules as last amended on October 12, 1970 of the Supreme Court of the United States.

QUESTIONS PRESENTED

I.

Whether the testimony as to the amount of the fee paid to Petitioner's attorneys prejudiced the jury against Petitioner and thereby denied him the effective assistance of counsel.

II.

Whether the challenged statute, 18 U.S.C.A. 1955 (84 Stat. 937) wherein there is contained a provision designated as Sub-paragraph E which described the prohibited, criminal conduct expecting any bingo, lottery or any similar game of chance conducted by an organization exempt from tax under Paragraph (3) of Sub-section (c) of Section 501 of the **Internal Revenue Code of 1954**, as amended, amounts to an invidious and unconstitutional discrimination against Petitioner.

III.

Whether 18 U.S.C.A. 1955 has been unconstitutionally applied to the facts in this case.

IV.

Whether the challenged statutes violate the provisions of the First Amendment which prohibits any law respecting an establishment of religion.

V.

Whether the Federal Government has any power to regulate activities which are wholly intrastate in nature.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

I.

Constitution of the United States, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

II.

Constitution of the United States, Amendment XIV:

> Section 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

III.

Title 28, Section 1955, United States Code:

> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
>
> (b) As used in this section–
>
> (1) "illegal gambling business" means a gambling business which–
>
> . . .

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

IV.

Title 28, Section 1511, United States Code:

(a) It shall be unlawful for two or more persons to conspire to obstruct the enforcement of the criminal laws of the state or political subdivision thereof, with the intent to facilitate an illegal gambling business. . . .

V.

Internal Revenue Code of 1954, § 501: . . .

(c) List of exempt organizations.–The following organizations are referred to in subsection (a): . . .

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefits of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office. . . .

STATEMENT OF THE CASE

This case originated by way of indictment of this Petitioner, the same being returned by the U.S. Grand Jury on May 3, 1972. (Tr. of Rec. page 1) This indictment contained four counts and named as defendants numerous persons including Appellants Pregno and Vanzie Beasley. (Tr. of Rec. page 1)

Count I of said indictment charged this Petitioner, together with others, with willfully and knowingly combining and conspiring and agreeing together with each other and with cer-

tain other persons named as co-conspirators, to operate a gambling business in violation of the laws of the State of Alabama involving five or more persons and according to various other terms set out therein, all in violation of 18 U.S.C.A. 1955.

Count II of the Indictment charged this Petitioner, together with others named therein, with conspiring and agreeing to obstruct the enforcement of the criminal laws of the State of Alabama pertaining to gambling in order to further an illegal gambling operation by corrupting certain named public officials, including the sheriff and District Attorney of Crenshaw County, Alabama, all in violation of 18 U.S.C.A. 1511. (Tr. of Rec. page 4)

The Government elected not to proceed to try the matters contained in Counts III and IV of the indictment, thereby leaving only the first two counts, above described, to be considered by the Court for the purposes of trial of this cause. (Tr. of Rec. page 83)

The Petitioner, Thomas L. Thaggard, Sr., on the 19th day of June, 1972, entered a plea of not guilty to all counts in the indictment and subsequently, with leave of Court, filed various motions preliminary to the trial of this cause and listed as follows:

A. Motion to Transfer (Tr. of Rec. page 25)

B. Motion to Dismiss the Indictment (Tr. of Rec. page 28)

C. Motion for a Continuance. (Tr. of Rec. page 62)

All of the motions were denied by the Trial Court by way of written orders. (Tr. of Rec. page 74)

Numerous other motions were filed by the various defendants, including the Petitioner herein, which motions are not significant to the appeal of this cause, but were in the nature of: Motion for Production of Statements of Co-conspirators; Motion to Require Election of Counts; Motion for a Bill of Particulars; and a Motion for Severance and Separate Trial. It should be noted that certain portions of the request for a Bill of Particulars was granted by the Trial Court and the right to inspect certain documentary evidence was also allowed by the Trial Court.

Thereafter, on the day set for trial, namely the 19th day of June, 1972, Petitioner's counsel renewed his motion for a con-

tinuance on the grounds of increased and continued notoriety by the newspapers and communication media relative to the trial of the case, which motion was overruled by the Trial Court. (Tr. of Rec. page 167)

Thereafter, a jury was selected (Tr. of Rec. pages 4-160) and trial of the cause was had from June 19 through June 22, 1972. (Tr. of Rec. page 134) The jury returned a verdict of guilty as charged in Counts I and II of the indictment against this Petitioner. (Tr. of Rec. page 939) Thereafter, this Petitioner was sentenced to three years in the custody of the Attorney General of the United States by the Honorable Frank M. Johnson, Jr., the Trial Judge in this cause. (Tr. of Rec. page 88)

Petitioner is presently out on bond and has appealed the judgment of the U.S. District Court for the Middle District of Alabama and the U.S. Court of Appeals for the Fifth Circuit where his prior conviction was affirmed on April 16, 1973. Petition for rehearing was timely filed and denied without opinion on the 18th day of June, 1973.

ARGUMENT IN SUPPORT OF GRANTING WRIT

I.

Petitioner's argument rests on the premise that appellate courts can and indeed must perform the function of insuring a fair trial free from the pernicious effects of error. Certainly, it is not possible for the appellate judge to **know** the influence of error on the trier of fact, but that does not mean that a judge cannot evaluate the probabilities of the influence of error.

Petitioner is unwilling to equate "correct result" with "justice" as did the United States Court of Appeals for the Fifth Circuit when it said:

> ". . . We have no doubt that under ordinary circumstances this maneuver was both improper and prejudicial and would warrant a reversal.
>
> "Nevertheless, upon mature reflection and cool analysis we are left with an abiding conviction that the guilt of the defendants in this case was so irrefutably evident that even in an errorless trial an acquittal would have been an incredible event."

The appropriate test which should be followed is set out in **Fahy v. Connecticut**, 375 U.S. 85 (1963), wherein the Court adhered to the test established in **Chapman v. California**, 386 U.S. 18 (1967). There the Court states the test in terms of "whether there is a **reasonable possibility** that the evidence complained of might have contributed to the conviction." See also **Kothekos v. U.S.**, 328 U.S. 750 (1945). That case fashions the rigorous requirement that an error can be considered harmless only if the Court is convinced BEYOND A REASONABLE DOUBT of its harmlessness.

The fact that the Court below found the error ordinarily reversible is indicative that they were not convinced beyond a reasonable doubt of its harmlessness. There was a reasonable possibility that the erroneously admitted evidence had substantial and injurious effect and influence in determining the jury's verdict.

Petitioner asks this Court to focus on the degree of probability that error influenced the judgment, and put aside personal belief in the soundness of the result. As a judge well knows, to err is human but to err is not always harmless. To tolerate as harmless the error above referred to which clearly had the effect of denying Petitioner the right to effective counsel amounts to a violent obstruction to the substantial rights of Petitioner, as well as a perversion of justice and of the judicial system. See **Coplon v. U.S.**, 191 F.2d 794, Cert. denied, 72 S.Ct. 363.

II.

18 U.S.C.A. 1955, Section E provides that this section shall not apply to any bingo game, lottery or similar game of chance conducted by an organization exempt from tax under Paragraph 3 of Subsection C of Section 501 of the **Internal Revenue Code of 1954**, as amended and thereby creates an invidious classification which is repugnant to the Equal Protection Clause of the Fourteenth Amendment.

The statute in question makes exempt from prosecution "corporations, and any Community Chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes," which is to say that individual citizens may not gamble, but churches and charitable foundations may. Who is to say that gambling does not cause a substantial detrimental effect on our society?

Why would exclusion of eleemosynary corporations and organizations from the criminal statute applying to gambling be less corrupting than the laws applicable to individuals? This unreasonable classification has the effect of complete elimination of individual gambling on the one hand and total encouragement indirectly of certain individuals on the other hand. Technically, charitable and other eleemosynary organizations within the State of Alabama can be prosecuted for violation of its criminal laws under state law yet they would be exempt from prosecution by the Federal Government since they fall within the above noted exception. The Petitioner Thaggard admittedly violated state statutes in operating the Crenshaw gambling house yet a nearby church which raffled or conducted a lottery for a prize was also guilty of a criminal violation but not subject to federal sanctions. Thus, 18 U.S.C.A. 1955 creates an unconscionable and unreasonable distinction subjecting some citizens to criminal prosecution while exempting others for no apparent valid reason.

III.

Even if 18 U.S.C.A. is held to be constitutional, as applied to the facts in this case it is unconstitutional.

The clear intent and meaning of this act was that it would not apply to a small, token amateur gambler such as Petitioner was when operating a gambling establishment known as "Cotton's Place" in Crenshaw County, Alabama. The legislative history of the statute indicates the clear intention of Congress to make a statutory attack only upon syndicated gambling and organized crime. Petitioner's operation had no interstate ramifications or connections whatsoever. Petitioner earnestly insists that he should not have been tried under this statute for the above stated reasons.

IV.

Petitioner contends that the challenged statutes, 18 U.S.C.A. 1955 and 1511, violate the provisions of the First Amendment which prohibits any "law respecting an establishment of religion." The pivotal question is: Is it constitutional for the Federal Government to allow religious organizations to gamble, and yet deny the same privileges to its private citizens?

A logical interpretation of the challenged statutes is that churches may gamble, but private citizens may not. Yet, this Court has held that government power is not to be used to favor religious organizations. **Everson v. Board of Education**, 330 U.S. 1 (1946). How can the Federal Government extend benefits to religious organizations and yet deny those benefits to its private citizens? This cannot consistently be done in light of the "establishment" clause of the First Amendment. If the Federal Government is going to extend certain privileges, then this should be done without regard to religious affiliation **vel non**.

In the words of Jefferson, the clause against establishment of religion was intended to erect "a wall of separation between church and state." The "establishment" clause has since been interpreted to mean that neither state not federal governing bodies may extend special privileges to a religious organization when the same privileges or benefits are not extended to a non-religious organization.

The statute in question, as already noted, does more than merely approach the verge of that limitation. The words of the late Mr. Justice Black in speaking to this issue should be remembered:

> "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. **We could not approve the slightest breach.**" **Everson v. Board of Education**, 330 U.S. 1, 18 (1946).

Measured by these standards, there is no way to circumvent the conclusion that the First Amendment has been here violated.

V.

The answer as pertains to 18 U.S.C.A. 1955 is clearly no, and therefore 18 U.S.C.A. 1955 is unconstitutional as to the placement of regulations on activities that are wholly intrastate in nature. The mere fact that Congress has determined for itself when a particular activity shall be deemed to affect commerce does not preclude further examination by the Supreme Court of the United States. The activities that are beyond the reach of Congress under the commerce power are those which are completely within a particular state which do not affect other states, and with which it is not necessary to interfere for the purpose of

executing some of the general powers of government. **Katzenbach v. McClung**, 379 U.S. 294, 13 L.Ed.2d 290, 85 S.Ct. 377 (1965). In effect, Thomas Thaggard's gambling in a rural Alabama county had so microscopic an effect on interstate commerce, if it had any effect at all, that it cannot be held to have encroached upon interstate commerce.

In this Republic, there is a dual system of government, national and state. Each within its domain is supreme, and one of the chief functions of the United States Supreme Court is to preserve the balance between them, protecting each in the powers it possesses, and preventing a trespass thereon upon the other. In re: Heff 197 U.S. 488, 49 L.Ed. 848, 25 S.Ct. 506 (1905). Under the Federal Constitution, the two governments, national and state, are each to exercise their powers so as not to interfere with the free and full exercise by the other of its powers. **South Carolina v. United States**, 199 U.S. 437, 50 L.Ed. 261, 26 S.Ct. 110 (1906), **South Covington and Cincinnati Railway Company v. Kentucky**, 252 U.S. 395 (1920). The power of a state to protect the lives, health and the property of its citizens and to preserve good order and the public morals was not surrendered to the general government nor restricted directly by the Constitution and it is essentially exclusive. **United States v. E. C. Knight**, 156 U.S. 1, 39 L.Ed. 325, 15 S.Ct. 249 (1919).

CONCLUSION

Petitioner submits this case should be reversed on the basis of the reasons hereinabove set out.

There are substantial constitutional questions submitted which should be fully briefed and decided.

Respectfully submitted,

J. PAUL LOWERY
Suite 1100 - Bell Building
Montgomery, Alabama 36104

August, 1973

Counsel for Petitioner

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 72-2512

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

THOMAS L. THAGGARD, SR., and
VANZIE BEASLEY,
Defendants-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF ALABAMA

(April 16, 1973)

Before COLEMAN, MORGAN and RONEY,
Circuit Judges.

COLEMAN, Circuit Judge: A jury convicted Thomas L. Thaggard, Sr. and Vanzie Beasley of conspiracy willfully and knowingly to directly and indirectly conduct, finance, manage, supervise, direct, and own all or part of a gambling business in violation of the laws of the State of Alabama, involving five or more persons for more than thirty days, 18 U.S.C., §1955.

Defendants were also convicted, in the same trial, of a conspiracy to obstruct the enforcement of the criminal laws of the State of Alabama pertaining to gambling, 18 U.S.C., §1511.

Upon these verdicts both men were sentenced to three years imprisonment for each offense to run concurrently.

Thaggard and Beasley assign fourteen reasons for the reversal of their convictions.

The judgment of the District Court is affirmed.

In June or July of 1971, Thomas L. Thaggard, Sr. asked one James R. Sadie to become a partner with him and Beasley in a gambling establishment. Thaggard stated, however, that he had heard of a recently enacted federal law against gambling and wanted to check on that law before proceeding further with the enterprise.

Prior to his appointment in that capacity the United States Attorney for that District had represented Thaggard in another prosecution, **Thaggard v. United States**, 5 Cir., 1965, 354 F.2d 735, cert. denied 383 U.S. 958, so Thaggard went to see his former counsel about the new "federal law". The United States Attorney told Thaggard that he could not and would not advise him as to the statute but did give him a copy of it and told him to consult some other attorney about the matter. Thaggard did so, stating that there would be only three partners or owners involved in the gambling operation. This attorney told Thaggard that he obviously would be in violation of the laws of Alabama but since "less than five persons would be involved, in his opinion there would be no federal violation".

After this conference, Thaggard, Beasley, and Sadie, as the original owners, opened the gambling house in a concrete building in a remote rural area of Crenshaw County, Alabama. From July until December, 1971, the establishment operated four nights a week. Games of dice and blackjack were played; the customers were served drinks and steaks free. The actual operation of the gambling house, however, required more than three individuals. Several other persons were hired to operate the gaming tables, to prepare food, and to guard the automobiles of the patrons while they were inside the building. A busy night would see as many as fifty or sixty persons participating in the gambling.

Several local public officials were aware of the gambling but did not interfere with it.

Completely read and fairly construed, the record reveals that the defense to the indictments was that the accused knew

they were violating the gambling laws of Alabama but, on the advice of counsel, had no intent to violate the federal statutes. In this context the case was tried, the defendants were convicted, and they now appeal.

Against this background we evaluate those assignments of error which, in our opinion, merit discussion.

1.

Because of pre-trial publicity, the trial court erred in not granting Thaggard's motions for continuance and a change of venue.

Thaggard insists that the publicity he received during the protracted litigation of the bank larceny offense, Thaggard v. United States, supra, which came to an end seven years previously, had rendered him "notorious in the community". This notoriety, coupled with the publicity given the gambling case, he says, immutably prejudiced his trial. Specifically, he refers to items which ran in the Montgomery Advertiser for the six months immediately preceding his trial.

The first article, on December 2, 1971 named the individuals involved in the gambling house and described in detail the operations of the establishment. The next article on May 5, 1972 featured front page pictures of Ray Horn, Drue Lackey, and Thomas Thaggard, Sr. It listed the individuals named in the indictment and quoted from portions of it. On May 10, 1972 a cartoon depicting a sign advertising the gambling establishment as "Cotton's Place" appeared. The May 12, 1972 issue again named the persons charged in the indictment and stated each count under which the defendants were charged. On June 1, 1972 the paper reported that James Sadie had pleaded guilty to the charges and again named the persons in the indictment. On June 4, 1972 the paper reported the uncovering of a large sports bookmaking operation in the Montgomery area. (There apparently was no connection between this operation and the gambling house.) Several known gamblers, including Thomas L. Thaggard, Sr., were listed as participating in this betting operation. However, no mention was made of the upcoming trial of the defendants involved in the gambling at "Cotton's Place".

Upon qualifying the jury for cause, the trial judge directed all members of the venire who had read or heard anything of the case to stand for special questions. Each was individually asked

if he could render a verdict upon the law and the evidence regardless of what had been heard or read. Only one responded in the negative, and was excused. A second jurer was disqualified for relationship to an alleged co-conspirator. The remaining eleven of those who had heard or read of the case responded that their verdict would not be affected by what they had heard or read.

The other nineteen members of the venire had not heard or read anything about the case. Thus, the defense began its peremptory challenges with nineteen individuals who had never heard of the case and eleven who had heard of it, although with no fixed opinion as a result of what they had heard or read. The appellants were allowed ten peremptory challenges to the trial panel and one challenge as to the alternate juror. The defense exercised only six of their ten peremptory challenges.

This hardly creates a picture of one who is empaled upon pre-trial hostility or drowned in a sea of fixed opinions.

Whether a change of venue is mandated depends on whether "there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district", Fed.R.Crim.P., Rule 21.

A motion for a change of venue is addressed to the discretion of the trial court and in the absence of an abuse of that discretion the trial decision will not be overturned on appeal, **United States v. Nix**, 5 Cir., 1972, 465 F.2d 90.

2.

18 U.S.C., §1955 is an unconstitutional regulation of intrastate activities and is in violation of the Tenth Amendment to the Constitution.

The contention of the appellants in this regard is rejected on the authority of **United States v. Harris**, 5 Cir., 1972, 460 F.2d 1041. We hold the statute to be constitutional on its face and there was no unconstitutionality in its application. Out-of-state cars were seen in the gambling house parking lot, poker chips from Las Vegas were used, and interstate telephone calls were made from the gambling house.

3.

18 U.S.C., §1955 and §1511 are unconstitutional in that they exempt activities conducted by a charitable or religious organization.

"The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same", Tigner v. Texas, 310 U.S. 141, 147, 60 S.Ct. 879, 882, 84 L.Ed. 1124 (1940). The legislative history of 18 U.S.C., §1955 indicates that Congress was concerned with organized crime; hence Congress has proscribed the gambling activities on which it believes organized crime of an interstate character thrives and has excluded those situations in which organized crime rarely appears. Accordingly, there was a rational basis for excluding charitable and religious organizations from the purview of these statutes.

4.

The Government failed properly to introduce and prove a violation of Alabama law.

We reject this argument because our examination of the record reveals that the specific statutes of the State of Alabama prohibiting the operation of gambling houses were entered as an exhibit in the case. Moreover, the jury was instructed that a violation of Alabama law must first be found before a conviction could be had. There was really no effort to deny or controvert a violation of the Alabama gambling laws. The argument was that there had been no intent to violate the federal statute. From our reading of the record it would have been impossible for the jury to have been in any way misled on this point.

5.

The trial court erroneously instructed the jury on the law as to advice of counsel and specific intent.

Appellants contend that the Government was required to prove specific intent to violate federal law, not just specific intent to commit the overt acts. They therefore object to the trial court's definition of specific intent as stated in the instructions. Their defense is that they sought advice of counsel before entering into the gambling operation.

The trial court gave the following instruction on specific intent:

"Well, you have heard a lot about intent, and you heard me talk to you a few minutes ago that it was a case of specific intent. The offenses charged in this indictment are offenses which require proof of specific intent on the part of each defendant before a defendant can be convicted, can be found guilty. What does specific intent mean? Specific intent means more than a general intent to commit an act or acts. To establish specific intent, the Government must prove beyond a reasonable doubt, as to a defendant before that defendant can be convicted, that that defendant knowingly did an act which the law forbids purposely intending to violate the law. Such intent may be determined from all of the facts and circumstances surrounding the case as reflected by the evidence. It is not necessary that the Government prove, in order to convict a defendant, that a defendant knew each of the elements involved in the substantive statute or each of the elements involved in the statute that the indictment says the conspiracy was formed to violate in count one. It is sufficient that the conspiracy agreement, if any exists, contemplated the commission of a crime and that the crime contemplated is in fact in law a federal crime. The defendants must have specifically intended to commit each act or each of the acts that make up the offenses charged. As a general rule, it is no defense to a criminal prosecution that a defendant acted in good faith relying on the advice of counsel; however, advice of counsel may be shown where it tends to prove or disprove an intent to violate the law. Advice of counsel is not a defense – is not a defense – where it's offered to tend to disprove that the defendant or defendants intended to violate the federal law; however, advice of counsel may be shown and considered by you jurors where it tends to disprove the intent to commit one or more of the acts involved. There must be a specific intent to commit each of the acts required in order to convict. The Government is not required to show that there must be a specific intent to violate a federal law, but the Government must prove that there was a specific intent to commit each of the acts necessary to prove a violation of the federal law."

The statutes here in question do not condition guilt upon knowledge that a federal law has been violated. It is sufficient that appellants intended to do all of the acts prohibited by the statute and proceeded to do them, **Cruz v. United States**, 10 Cir., 1939, 106 F.2d 828.

Advice of counsel, when given a full disclosure of all the facts and followed in good faith, may be a matter to be considered by the jury in determining the appellants' guilt, **Shushan v. United States**, 5 Cir., 1941, 117 F.2d 110, cert. denied 313 U.S. 574. But where defendants know that their conduct is violative of state law, their wrongful purpose **ab initio**, established beyond a reasonable doubt, leaves them in no position to claim that they had no intention of violating a federal statue which, in fact, denounced the unlawful conduct as also constituting a federal crime. Defendants may have misunderstood the full reach of the federal statute but they deliberately took that risk when they set out upon a calculated violation of the laws of Alabama. The instructions gave them all, and possibly more than, they were entitled to receive under the facts of this case.

6.

The trial court erred in allowing questions and answers pertaining to a remark made by Thaggard to witness Ben Allen Grooms.

Ben Allen Grooms was employed by the Alabama Bureau of Investigation, a private agency, as a security guard at the gambling establishment. Grooms testified as a witness for the prosecution. During Grooms' testimony, the prosecutor, referring to an overt act charged in Count II of the indictment, asked if Thaggard had ever stated what it cost to operate the place. Grooms answered that when he had expressed a concern about the place being raided, Thaggard replied that he need not worry since he was "paying three hundred dollars a night to open the doors". Thaggard contends that the remark was prejudicial and should not have been allowed. We disagree. This was one of the overt acts charged in the indictment, **United States v. McGann**, 5 Cir., 1970, 431 F.2d 1104. The statement was admissible against all the co-conspirators since the statement of one conspirator made in furtherance of a going conspiracy is admissible in evidence against a co-conspirator, **United States v. Nall**, 5 Cir., 1971, 437 F.2d 1177.

7.

The trial court erred in not granting Thaggard's motion for mistrial after the prejudicial comment by the United States Attorney.

The United States called as its only rebuttal witness the

United States Attorney who had formerly represented Thaggard but who had not participated in the trial of the instant case because he had been subpoenaed (but not called) as a witness for the defense. This official came to the courtroom from time to time but did not see any substantial portion of the trial.

On direct examination Mr. DeMent was asked why he, as United States Attorney, chose not to prosecute certain other participants or conspirators in the illegal operation. On cross-examination one of the defense attorneys further inquired into the subject. On redirect the Government asked if there were other reasons or factors involved in choosing not to prosecute those particular defendants. At that point the following testimony occurred:

"A. All right; as to Sheriff Horn, Sheriff Horn has been the Sheriff of Crenshaw County for over twenty years. He's been in law enforcement for thirty-four years. He is sixty-three years old and in ill health. He has resigned in disgrace. It would serve, in my judgment, and I might add in your and Mr. Byrne's judgment, no useful purpose to prosecute and convict a man who has served his state for over twenty years and in law enforcement for over thirty-four years and is sixty-three years old and in ill health. When he comes to you through his lawyers and says, 'I will resign immediately', and he has two and a half years remaining on his term and he further says, 'I will give you a statement to the effect that I will never seek public office again', and his lawyers represent that he will tell you everything he knows about the conspiracy in Crenshaw County to operate –

"MR. STRAITON: We object to that, your honor.

"THE COURT: Overrule it.

"A. To operate a gambling casino and when he says, 'If you need me, I'll testify'; we weighed whether we would be better off prosecuting and attempting to convict him or whether we would be better off getting an honest Sheriff in Crenshaw County appointed by the Governor, and I have spoken to Governor Jere Beasley –

"MR. LOWERY: We object to that.

"THE COURT: I sustain it; that is not responsive.

"MR. LOWERY: We move for a mistrial.

"THE COURT: That is denied."

Quite obviously, this line of testimony had no business in the trial. Neither side should have been allowed to drag it in. What the United States Attorney did about the prosecution of other defendants or conspirators in this case, and his motives for it, was solely within his discretion, certainly insofar as these or other defendants were concerned, **United States v. Cox**, 5 Cir., 1965, 342 F.2d 167, cert. denied 381 U.S. 935. Nevertheless, the testimony of the United States Attorney merely stated his reasons for not prosecuting the county sheriff. It contained no remarks directed toward the guilt or innocence of the defendants at the bar. Indeed, Mr. DeMent could have personally known nothing about that, except that he knew of Thaggard's visit to his office which admittedly took place before the alleged criminal activities began. There is nothing in this skirmish which would justify a reversal.

8.

The trial court erred in not granting Thaggard's motion for mistrial after the prejudicial comment by the Alabama District Attorney.

Alabama District Attorney Jesse Oliver Bryan was called as the closing witness for the Government. Bryan's Judicial District included Crenshaw County. During direct testimony, he related the following telephone conversation with Billy King, County Solicitor of Crenshaw County:

"A. On 30 November, I called Billy King in the afternoon and said, 'Billy, do you know anything about any illegal gambling operations going on up in northern Crenshaw County?' And Billy precisely said to me –

"MR. STRAITON: Your honor, we object to this.

"THE COURT: Overrule it.

"A. – 'Job, I know about it' – Job is my nickname down there – 'but I swear that I have never taken a penny from them; Ray Horn has.' And that sent me right up through the ceiling; I didn't believe Ray Horn would do anything like that.

"MR. LOWERY: Object to comments by the witness.

"THE COURT: Sustain it.

"MR. LOWERY: Move the Court for a mistrial.

"THE COURT: As to the reaction of the District Attorney as to what County Solicitor King said, it wasn't responsive to the question, it is excluded.

"WITNESS: I am sorry; I am sorry.

"THE COURT: It is excluded."

This evidentiary occurrence provides no peg upon which to hang a reversal. The objection was "to comments by the witness", the objection was sustained, and the comment was excluded. That ends the matter.

9.

The trial court prejudiced the jury when it admonished Thaggard's attorney.

During recross-examination of the United States Attorney the following colloquy occurred between Thaggard's counsel and the trial court:

"MR. LOWERY: Yes sir; your honor, we would move to exclude the testimony of Mr. DeMent as to the reasons stated for his selection of the various parties in this charge; on the grounds that it was highly prejudicial, it invaded the province of the jury as to whether – the guilt or innocence of the parties.

"THE COURT: Well, a trial is not a game, Mr. Lowery. The trial is to get the truth of the matter, and you have permeated this trial with questions and statements and testimony that a deal has been made and that some had been chosen and some hadn't been chosen. Fairness requires that he be allowed to explain it; so your motion is denied.

"MR. LOWERY: All right, sir; we move for a mistrial.

"THE COURT: That motion is denied."

Relying on the authority of **United States** v. **Coke**, 2 Cir., 1964, 339 F.2d 183; **Gudger** v. **United States**, D.C. Cir., 1963, 314 F.2d 268, **United States** v. **Ah Kee Eng**, 2 Cir., 1957, 241 F.2d 157; and **United States** v. **Minuse**, 2 Cir., 1940, 114 F.2d 36, Thaggard contends that the trial court's comment was so prejudicial as to require a reversal. But in each of these cases with the exception of **Gudger**, the appellate court reversed on the basis of **numerous** and **continuing** comments and remarks by the trial judge. And the short **per curiam** decision in **Gudger**

emphasized that the trial judge's admonishment of defense counsel's impugnment of a government witness may have negated counsel's entire attack on credibility, thus invading the province of the jury. Any prejudice attributable to the court's solitary comment was cured by his charge to the jury that they were to draw no inferences from any comments he may have made during the trial, **Lacaze v. United States**, 5 Cir., 1968, 391 F.2d 516.

10.

The trial court erred in allowing the Government to question the amount of fee Thaggard's attorney received.

To at least one member of this panel, this is the most questionable aspect of the trial. As already stated, the defense, however poor it may have been, was that Thaggard and Beasley were relying on advice of counsel that their participation in the gambling establishment did not amount to a violation of federal law. In support of this defense, Mr. Straiton, a trial attorney for Thaggard, took the witness stand to verify the advice he had given Thaggard prior to the commencement of activities.

After his direct testimony, the following occurred on cross-examination:

BY MR. SEGREST (Assistant United States Attorney):

"Q. What is – what was your fee for this advice?

"A. I think my fee was fifty dollars, Mr. Segrest.

"Q. What is your fee in this case?

"MR. WHITESELL: We object to that.

"THE COURT: I sustain it.

"MR. SEGREST: Your honor, don't you think that would be admissible on bias, to show his bias in this case and as a witness.

"MR. LOWERY: We will stipulate we got a fee, your honor; but we object to any discussion of the amount.

"MR. SEGREST: We think the amount of it, the extent of it, would certainly affect his judgment and integrity as a witness and we would ask for permission to ask him that question.

"THE COURT: All right; go ahead.

"Q. What is your fee in this case, Mr. Straiton?

"MR. LOWERY: We object.

"THE COURT: Overrule it; I will permit it on that theory; I think I would have to.

"A. The fee that I received from Mr. Cotton Thaggard for representing – representing him was twenty five hundred dollars.

"Q. Now, what is the total fee of your firm; you – you are part of a firm, aren't you?

"A. Yes, sir.

"Q. What –

"A. Six thousand dollars.

"Q. And is that the total fee that you are to be paid in this case?

"A. Sir?

"Q. Is that the total extent of the fee you are to be paid in this case?

"A. Well, that is the total fee; yes.

"Q. How about expenses, now; are you to be paid expenses in addition?

"A. Yes, sir."

Cross-examination as to the amount of the fee paid to counsel for services in the case then on trial before the jury should not have been admitted. Attorney Straiton took the stand to verify Thaggard's request for legal advice. Without objection he stated that he received a fee for the advice and it was stipulated that the trial attorneys were receiving a fee for their services. The objection was to stating the amount of the fee. The prosecutor stated that he wished to prove the amount as reflecting the possible bias and prejudice (credibility) of the attorney-witness. If the jury wished to consider Straiton's status as attorney as bearing upon his credibility, that fact had been obvious from the beginning of the trial. That he had been paid a fee had been stipulated. Defendants have a constitutional right to counsel and attorneys are not expected to work free, even for

indigents. The Criminal Justice Act provides some remuneration even for court appointed attorneys, although paid by the taxpayers. As we devine it, the real purpose for eliciting this information was to suggest that it took a big-time gambler to pay such a fee, plus the thought that Thaggard really feared a conviction and was willing to pay a "big fee" in the hope of avoiding conviction. We have no doubt that under ordinary circumstances this maneuver was both improper and prejudicial and would warrant a reversal.

Nevertheless, upon mature reflection and cool analysis we are left with an abiding conviction that the guilt of the defendants in this case was so irrefutably evident that even in an errorless trial an acquittal would have been an incredible event. Under the jurisprudence applicable to errors which are harmless beyond a reasonable doubt, we decline to reverse the convictions.

We are not unaware of the proposition that allowing prosecutors to escape reversal by the application of the harmless error rule may tempt some to wield any available stick, if the trial court permits it, hoping to get the conviction first and then to take refuge at the altar of harmless error. Prosecutors should try their cases within the rules of evidence and our decision in this case is never to be construed as an invitation to do otherwise. We decide this case on the precept that the ends of justice do not require a reversal for this lapse; otherwise, one unhesitatingly would be ordered.

The remaining points of the fourteen originally raised do not merit discussion .

The judgment of the District Court as to both appellants is

AFFIRMED.

B1

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 72-2512

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

THOMAS L. THAGGARD, SR., and
VANZIE BEASLEY,
Defendants-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF ALABAMA

ON PETITIONS FOR REHEARING AND PETITIONS
FOR REHEARING EN BANC
(Opinion Apr. 16, 1973, 5 Cir., 1973, ____ F.2d ____).

(June 8, 1973)

Before COLEMAN, MORGAN and RONEY,
Circuit Judges.

PER CURIAM

The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petitions for Rehearing En Banc are DENIED.

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Nos. 73-242 and 73-255

In the Supreme Court of the United States

OCTOBER TERM, 1973

THOMAS L. THAGGARD, SR., PETITIONER

v.

UNITED STATES OF AMERICA

VANZIE BEASLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
HENRY E. PETERSEN,
Assistant Attorney General,
JEROME M. FEIT,
SHIRLEY BACCUS-LOBEL,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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525-281—73——1

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-242

THOMAS L. THAGGARD, SR., PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-255

VANZIE BEASLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (*Thaggard* Pet. App. A) is reported at 477 F. 2d 626.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1973, and petitions for rehearing were denied on June 8, 1973 (*Thaggard* Pet. App. B). The

petition for a writ of certiorari in *Thaggard*, No. 73–242, was filed on August 4, 1973, the time for filing having been extended by Mr. Justice Powell until August 7, 1973. The petition in *Beasley*, No. 73–255, was filed on August 7, 1973, no extension of time having been obtained, and is thus untimely under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

18 U.S.C. 1955 and 1511 are set forth at *Beasley* Pet. Apps. D and E.

QUESTIONS PRESENTED

1. Whether, as claimed by both petitioners, 18 U.S.C. 1955 is an unconstitutional regulation of intrastate activities.

2. Whether, as claimed by petitioner Thaggard, 18 U.S.C. 1955 violates either the equal protection clause of the Fourteenth Amendment or the establishment clause of the First Amendment because eleemosynary organizations are exempted from the statute's coverage.

3. Whether cross-examination of petitioner Thaggard's trial counsel, who testified as a defense witness, as to the amount of his fee for representation of petitioner in this case constitutes reversible error under the circumstances as to either petitioner.

4. Whether certain of the government's rebuttal testimony, which pursued a line of inquiry initiated by the defense (*i.e.*, the decision not to prosecute certain individuals), amounted to reversible error as to petitioner Beasley.

5. Whether petitioner Beasley was deprived of a fair trial by the trial court's refusal to qualify prospective jurors by asking whether they would attach greater weight to the testimony of law enforcement officials than to that of other witnesses.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Alabama, petitioners were convicted of having conspired, in violation of 18 U.S.C. 371, to conduct a gambling business involving five or more persons, in substantially continuous operation for more than thirty days, and in violation of the laws of the State of Alabama, as proscribed by 18 U.S.C. 1955.[1] They were also convicted of having conspired to obstruct the enforcement of the criminal laws of the State of Alabama pertaining to gambling, as proscribed by 18 U.S.C. 1511. Petitioners were each sentenced to three years' imprisonment on both counts, the sentences to run concurrently. The court of appeals affirmed (*Thaggard* Pet. App. A).

Petitioners do not contest the sufficiency of the evidence, and the facts are not in dispute (*Beasley* Pet. 5).

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[1] While petitioners have not raised this issue at any stage of the proceedings, we note that the question whether it is proper to charge conspiracy to violate 18 U.S.C. 1955 is presented in *Fein* v. *United States*, No. 73-175 (petition for certiorari pending). See also *Gray* v. *United States*, No. 73-231 (petition for certiorari pending), and *Ianelli* v. *United States*, No. 73-64 (petition for certiorari pending). The government has not opposed the granting of certiorari in those cases.

In early summer of 1971, petitioner Thaggard proposed to petitioner Beasley and one James Sadie that they establish a gambling operation in a rural part of Crenshaw County, Alabama.[2] The three men became partners in the endeavor, each providing capital for the enterprise (Tr. 46–57, 58, 107–110, 414–415, 572–573, 587–588). The gambling operation commenced in late July 1971 and continued to operate through December 1971 (Tr. 59–63, 72–74, 141, 288–297, 375–378, 499, 500, 522–523, 527–529). Games of dice and blackjack were played, and customers were served steaks and drinks without charge (Tr. 63, 68, 72–73, 78–79, 288–297). Several persons were hired to operate the gaming tables, to prepare food, and to guard the patrons' automobiles. Petitioner Thaggard and several of these employees testified at trial, admitting the operation of a gambling establishment (Tr. 107–113, 120–121, 176–181, 212–214, 220–222, 453–455, 461, 467, 622–632). Several patrons of the establishment testified as well (Tr. 228–234, 240–247, 252–257, 260–262, 406–411).

When petitioner Thaggard initially approached Sadie, he advised him that there would be no interference from Crenshaw County law enforcement officials (Tr. 52–53). When the enterprise commenced operation, one employee expressed to petitioner Thaggard his concern that the gambling house might be raided. Petitioner Thaggard advised him that there was no cause for concern, because he was paying $300 a night "to keep the doors open" (Tr. 187–191). In

[2] Sadie, whose case was severed, testified for the government.

fact, local law enforcement officials did not interfere with the operation.

Agent James Day of the FBI, who was acquainted with petitioner Beasley, asked him about the gambling establishment, and Beasley admitted its operation (Tr. 375–380). After receiving this information, agent Day notified Alabama State authorities, who on November 30 conveyed that information to the local district attorney, Jessie Bryan (Tr. 378). Bryan then telephoned the County Solicitor, William King. (King and County Sheriff Ray Horn were indicted with petitioners on the Section 1511 charges; their cases were severed.) When asked whether he knew of the operation, King said he did. He also said that he had taken no money with respect to the gambling operation, but that Sheriff Horn had (Tr. 428–431).

County Solicitor King testified and denied having made this statement (Tr. 494–496). He did, however, admit knowledge that the gambling operation existed and that it operated in violation of state law. He had himself gambled at the establishment (Tr. 499–501). Telephone logs revealed sixty telephone calls between King and petitioner Beasley during the period of the conspiracy (Tr. 368) and two calls placed to King's residence from the gambling establishment (Tr. 504).

Sheriff Horn testified that he was aware through petitioner Thaggard of the operation of the illegal gambling establishment. He denied, however, the existence of any agreement not to interfere with the operation (Tr. 414–426).

The defense to the Section 1955 charge was that petitioners did not realize they were violating federal

law. In petitioner Thaggard's case, this belief was ostensibly predicated upon advice of counsel. When petitioner Thaggard initially approached Sadie in mid-1971, Thaggard told him that the proposed operation would not violate federal law (Tr. 52–53). According to Sadie, Thaggard stated that he had been advised by the United States Attorney, Ira De Ment, that the government would not prosecute (Tr. 76–77).

Petitioner Thaggard testified that he had consulted De Ment, who had represented petitioner while in private practice, because he had heard there was a new federal statute on gambling. De Ment supplied him with a copy of the statute (18 U.S.C. 1955) but, according to Thaggard, told him that he could not advise him with respect to the statute because it was new and there were no cases construing it and because it was too ambiguous. De Ment suggested that he take the statute to an attorney (Tr. 574–575, 577–579). Thaggard then consulted attorney James Straiton, his trial counsel. According to petitioner Thaggard, Straiton advised him that because only three persons would be financing and managing the operation, it would not be a violation of federal law; Thaggard testified that he relied on this advice (Tr. 580–584).

Straiton testified that he had analyzed the statute for petitioner and advised him that, although there were as yet no cases construing the statute, it was his opinion that the law was aimed at syndicated gambling. He conveyed to petitioner his opinion that, since only three partners would be involved, the operation would not violate the clear intent of the statute (Tr. 543–548). He stressed to petitioner that this advice was merely his

interpretation (Tr. 545). Straiton also testified that petitioner well knew that the operation would be in violation of state law (Tr. 552, 556).

United States Attorney De Ment testified that petitioner Thaggard had approached him for a copy of the new federal gambling statute. He provided petitioner with a copy but did not interpret it for him. Contrary to Thaggard's testimony, De Ment testified that he told him that the statute was quite clear. He did advise Thaggard to take the statute to his attorney and also indicated that he would prosecute if Thaggard violated the law (Tr. 637–639). Thaggard told De Ment that he was going to open a gambling house. De Ment told him it was a violation of state law, to which petitioner responded, "I can handle the locals" (Tr. 644). Two weeks after having received a copy of the statute, petitioner Thaggard again contacted De Ment, stating that he had read the statute and saw no "way to get around it", and De Ment told him that his impression was quite correct (Tr. 645).

When agent Day spoke with petitioner Beasley, he advised him that the gambling operation might violate federal law. While Beasley indicated that he wished to avoid violating federal law, he never stated that he did not realize that he was violating federal law (Tr. 379–381, 387–390). An employee of the establishment testified that when he asked the partners whether the gambling operation violated federal law, they replied that as far as they knew there was no violation (Tr. 455). Sadie, in particular, said that there was nothing to worry about because if they were in violation of federal law, they did not know it (Tr. 466).

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ARGUMENT

1. Both petitioners contend that because, in a prosecution under 18 U.S.C. 1955, the government need not demonstrate that a particular gambling enterprise has any impact upon interstate commerce, that statute unconstitutionally regulates intrastate activities. Relying upon the legislative determination that illegal gambling is an enterprise which involves the widespread use of interstate facilities and significantly affects interstate commerce, the courts of appeals have consistently rejected such claims, *United States* v. *Hunter*, 478 F. 2d 1019, 1020–1021 (C.A. 7); *United States* v. *Palmer*, 465 F. 2d 697 (C.A. 6), certiorari denied, 409 U.S. 874; *United States* v. *Becker*, 461 F. 2d 230, 233–234 (C.A. 2); *United States* v. *Riehl*, 460 F. 2d 454, 458 (C.A. 3); *Schneider* v. *United States*, 459 F. 2d 540 (C.A. 8), and there is no reason for this Court to review the decision of the court of appeals in this regard.

2. Petitioner Thaggard also contends that because eleemosynary organizations—*i.e.*, those exempt from tax under Section 501(c)(3) of the Internal Revenue Code of 1954, as amended—are exempt from the coverage of the statute, Section 1955 violates the equal protection clause of the Fourteenth Amendment.[3] The exemption reflects, however, a rational and valid

[3] Although the petition relies upon the Fourteenth Amendment, which is inapplicable to acts of Congress, we treat the petition as contending that Section 1955 violates the similar requirements of the due process clause of the Fifth Amendment. See *United States Department of Agriculture* v. *Moreno*, No. 72–534 (decided June 25, 1973).

distinction. See *Tigner* v. *Texas*, 310 U.S. 141. The legislative history indicates that Section 1955, part of the Organized Crime Control Act of 1970, 84 Stat. 937, is primarily aimed at gambling enterprises, the profits of which, Congress concluded, constitute a major source of power for organized crime. See *United States* v. *Harris*, 460 F. 2d 1041, 1044–1048 (C.A. 5). Exemption of essentially non-profit organizations from the coverage of Section 1955 is logically consistent with that purpose. Nor does the exemption, to the extent it includes religious organizations, contravene the establishment clause of the First Amednment, as petitioner urges. See *Walz* v. *Tax Commission*, 397 U.S. 664.

3. Petitioners also contend that the trial court committed reversible error in permitting the prosecutor to inquire, in cross-examining Straiton (petitioner Thaggard's counsel, who testified as a defense witness) as to the amount of the fee received by Straiton for his representation of petitioner Thaggard in this case. The court accepted the prosecutor's position that such questioning was relevant to show the witness's bias and credibility (Tr. 550–551). Petitioners urge that this line of questioning was particularly prejudicial, since profitability was in effect an element of the offense. The court of appeals concluded, without considering the profitability argument, that inquiry as to "the amount of fee paid to counsel for services in the case *then on trial before the jury*" was improper (*Thaggard* Pet. App. A12; emphasis in original). The court concluded, however, that the evidence with respect to operation of the

gambling house, virtually unrefuted even at trial and supplied in large part by petitioner Thaggard and other principals, was so overwhelming that the error was harmless beyond a reasonable doubt and that "an acquittal would have been an incredible event" even had petitioners received an errorless trial (*id.* at A12–A13). That conclusion was supported by the record in this case and does not warrant review by this Court.

4. During cross-examination of government witnesses Horn and King, the defense fully explored the witnesses' motives for testifying. Responses to questioning aimed at determining why these men had not been prosecuted disclosed that both believed the cases against them, which had been severed, would be dropped in return for their testimony. At one point in the questioning, defense counsel strongly implied that the charges against King were to be dismissed because the prosecutor knew King had not received anything to obstruct enforcement of the gambling laws. (Tr. 583–584, 671–672.)

When De Ment testified in rebuttal, the decision to prosecute certain individuals and to forego prosecution of others was explored more fully. He testified that as United States Attorney he considered it more important that these public officials resign their offices than that they be prosecuted, and he agreed to drop the charges against them in return for their resignations and their cooperation as witnesses (Tr. 642, 649, 658–663).

This line of questioning, in an area first explored by defense counsel and designed both to expose the

situation fully to the jury and to counter defense counsel's implication that the decision not to prosecute these individuals was due to an insufficiency of evidence, was not in our view improper under the circumstances. The court of appeals thought otherwise, concluding that neither side should have entered this area, at least to the extent that it involved the exercise of prosecutorial discretion. The court concluded, however, that the testimony, while improperly admitted, did not warrant reversal (*Thaggard* Pet. App. A7–A9). Accepting the premise of the court of appeals, this conclusion was correct.

5. Finally, petitioner Beasley asserts that the trial court erred in refusing to qualify prospective jurors by inquiring whether they would attach greater weight to the testimony of law enforcement officials than to that of ordinary witnesses. The contention is without merit. The failure to give such an instruction constitutes no abuse of discretion where, as here (Tr. 150–151, 157, 900–903), the jury is otherwise properly instructed on the standards for weighing and evaluating testimony. See, *e.g.*, *United States* v. *Jackson*, 448 F. 2d 539, 541–543 (C.A. 5);[4] *Ross* v. *United States*, 374 F. 2d. 97, 105 (C.A. 8), certiorari denied, 389 U.S. 822;

[4] Petitioner's reliance upon *Brown* v. *United States*, 338 F. 2d 543 (C.A.D.C.), and *Sellers* v. *United States*, 271 F. 2d 475 (C.A.D.C.), is misplaced. In those cases, refusal to give the tendered instruction was held to be reversible error where the testimony of law enforcement officials was virtually the entire case for the prosecution. In this case, the government relied heavily upon the testimony of the principals and that of employees and customers of the gambling establishment.

Gorin v. *United States*, 313 F. 2d 641, 646–647 (C.A. 1), certiorari denied, 374 U.S. 829.

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
JEROME M. FEIT,
SHIRLEY BACCUS-LOBEL,
Attorneys.

NOVEMBER 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973